IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. **492** OF **2003**

1. Venugopal Jaj Reddy,
Aged about 42 years,
residing at Chawl No.F/2912,
Sion Koliwada, Mumbai.

2. Murugan Tangraj Shetty,
Aged about 30 years, residing at
Lefar Colony, Zopadpatti,
Gandhinagar, Sion, Mumbai.

3. Govind Rajbabu Jagar,
Aged about 22 years, residing at
Devarapalli, District
Vishakhapattanam, Andhra Pradesh.

4. Tilakraj Udavdas Kekhrani,
Aged about 35 years, residing
at Deverapalli, District
Vishakhapattanam, Andhra Pradesh.

5. Smt. Laxmi Venugopal Reddy,
Aged about 26 years, residing
at Chawl No.F/2912, Sion
Koliwada, Mumbai.

6. Smt. Shanti Rajdorai Reddy
Aged about 45 years, residing at Sion
Chunabhatti, Mumbai

(Nos. 1 to 4 in jail custody at
Kolhapur Central Prison and Nos.5
and 6 at Yervada Central Prison,
Yervada) ...Appellants.
(Orig. Accused Nos.
1 to 6)

V/s

The State of Maharashtra
(At the instance of Naupada
Police Station, Thane) ...Respondents.

Mr. Anil Lalla i/b M/s Lalla & Lalla, advocates for
the appellants.

Mr. D.P. Adsule, APP for the respondent - State.

CORAM: V.M.KANADE,J.
DATE: 6th April, 2005.

ORAL JUDGMENT:

1. By this appeal, the appellants are challenging the judgment and order passed by the Special Judge in Special Sessions Case No. 370 of 2001. The Special Judge by the judgment and order dated 29/01/2003 convicted the appellants for the offence punishable under section 20(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter called "the N.D.P.S. Act") and sentenced them to undergo rigorous imprisonment for a period of 10 years and to pay fine of Rs 50,000/- each and, in default of payment of fine, to suffer further rigorous imprisonment for a period of two years each.

2. Brief facts are as under:-

3. On the night intervening 23rd/24th July 2001 the Assistant Police Inspector Uttamkumar Adhikari and his staff were on patrolling duty and they noticed two auto-rikshaws in the said area near Thane. The Police noticed that in each auto-rikshaw, there was one lady and two males and there were some bags kept in the auto-rikshaws. The Police were suspicious about the contents of the bags in the auto-rikshaws and they,

therefore, searched the said bags and recovered 59 kgs and 900 grams of Ganja from the two auto-rikshaws. On 24/07/2001, the FIR was registered at the Naupada Police Station, Thane and the accused were arrested for possession of Ganja. A report was obtained from the Chemical Analyser informing the presence of Ganja in the sample which was received. A charge-sheet was filed against the appellants and the Special Judge convicted all the accused for possession of Ganja.

4. The learned Counsel appearing on behalf of the appellants submitted that the charge which was framed against the accused itself was defective and, therefore, serious prejudice was caused to the accused. It was submitted that there was no reference made in the said charge regarding the seizure of Ganja from the two auto-rikshaws and the charge simply stated that the accused were found in possession of Ganja weighing 59 kgs and 900 grams which was in bag, suit case. He further submitted that the prosecution has not complied with the provisions of sections 42(1), 42(2) of the N.D.P.S. Act. He submitted that it was the duty of P.W. 5 - API Uttamkumar Adhikari to have followed the procedure prescribed under the said provisions as he had suspected that the bags which were kept in the auto-rikshaws contained Ganja

as he had noticed the smell of Ganja. The learned Counsel, therefore, submitted that when the Investigating Officer had a reasonable ground to believe that the bags were containing some narcotic drugs, the provisions of section 42(1) and 42(2) should have been followed, the moment he had suspected that the bags contained the Ganja. He submitted that the Special Judge had erred in holding that the provisions of section 42 were not attracted to the facts of the present case as the recovery which was made by the Investigating Officer was a chance recovery. The learned Counsel further submitted that the provisions of section 50 of the N.D.P.S. Act also were squarely attracted to the facts of the present case since the contraband was in the immediate possession of the appellants. He relied upon the Full Bench Judgment of this Court in the case of Ebanezer Adebaya @ Monday Obtor Vs. State of Maharashtra reported in **1996(2) ALL MR 402** in support of the said submission. The learned Counsel submitted that the Special Judge had not taken into consideration the ratio of the judgment of the Supreme Court in the case of State of Punjab vs. Baldev Singh reported in **1999 CRI.L.J. 3672**. The learned Counsel further submitted that the prosecution had failed to examine the Chemical Analyser who had conducted the test of the

samples of the contraband which were recovered from the appellants and non-examination of the Chemical Analyser had caused serious prejudice to the accused as they were denied their right to cross-examine the material witness on the question of the tests which were conducted by him. The learned Counsel further submitted that there was a non-compliance of section 57 of the N.D.P.S. Act and due to the non-compliance of the said mandatory provisions, the appellants were entitled to be acquitted. He further submitted that the prosecution had not examined the second rickshaw driver in whose rickshaw the appellant No.1, 5 and 4 were travelling at the material time and, therefore, there was no independent corroboration to the evidence of panch and the police witnesses. He further submitted that a serious doubt was created regarding the safe custody of the samples, taking into consideration the manner in which the sealing, sampling and labelling of the contraband was made in the present case and, therefore, the benefit of doubt was liable to be given in favour of the accused.

5. The learned Counsel appearing on behalf of the appellants relied on number of judgments of this Court as well as the Supreme Court in support of the said submissions which will be considered at the

appropriate stage.

6. The learned APP appearing on behalf of the respondent, on the other hand, submitted that the Trial Court had appreciated the evidence on record in its proper perspective and there was no reason to interfere with the said judgment and order which is passed by the Special Judge. He submitted that the provisions of section 42 and 50 are not attracted to the facts of the present case as the recovery was a chance recovery and the Investigating Officer had no inclination of the fact that the bags in the auto-rikshaws contained contraband narcotic / psychotropic substance. He submitted that there was no lacuna in the prosecution case. The accused were caught red-handed and were transporting Ganja in auto-rikshaws and were not in a position to give any explanation regarding their presence alongwith the contraband on the night intervening 23rd/24th July 2001.

7. I have heard the learned Counsel appearing on behalf of the appellants who has taken me through the judgment and order of the Trial Court and the depositions of the witnesses examined by the prosecution. The learned Counsel has taken me through

the various judgments of this Court and the Supreme Court. I have also heard the learned APP appearing on behalf of the respondent - State. I have given by anxious consideration to the submissions made by the learned Counsel appearing on behalf of the appellants and the learned APP appearing on behalf of the respondent.

8. In the present case, the prosecution has examined in all six witnesses. Out of these six witnesses P.W. 1 is the panch, P.Ws. 2 to 5 are the Police Officers and P.W. 6 - Sachin Subra Mane is one of the auto-rickshaw drivers in whose rickshaw some of the bags were found containing contraband Ganja.

. P.W. 5 - API Uttamkumar Baburao Adhikari has stated in his evidence that on the night between 23rd/24th July 2001, he was on patrolling duty alongwith his staff and they were proceeding towards the telephone exchange corner in their jeep. He and his staff noticed that two auto-rickshaws were coming from the other side in full speed. He, therefore, asked the rickshaw drivers to stop the rickshaws and he noticed that the accused were suspiciously looking towards the bags which were kept in the auto-rikshaws. He, therefore, directed the constable to bring panchas

and the bags were opened in the presence of panchas and they were found to be containing Ganja. In the cross-examination, P.W. 5 has stated that he did notice smell of Ganja to some extent and that, at that time, he came to know that the bags had to be searched under the N.D.P.S. Act. He further admitted in his cross-examination that it never transpired as to which bag belonged to which particular person.

. P.W. 6 - Sachin Mane, a rickshaw driver, has stated in his evidence that he had parked his rickshaw at Thane Station and when his turn came, the accused sat in his rickshaw with bags and suitcases and that he was stopped by the Police Officers near the Malhar Hotel. The bags which were searched found to be containing Ganja. He also stated in his evidence that there was another rickshaw which was stopped alongwith his rickshaw and rest of the accused were in the said rickshaw.

. P.W. 1 - Dnyaneshwar Maruti Lashkare has stated in his evidence that he was called as panch and that certain suitcases were searched at Kopri Road near Saraswati School and that the accused admitted that the bags belonged to them and that the bags contained Ganja Leaves. In his cross-examination, he, however,

admitted that there was no reference in the panchanama that the accused had informed that the bags were belonging to them.

. P.W. 2 - API Uttamkumar Adhikari had registered a complaint. P.W. 3 - Police Constable Pandurang Kumbhare who was on patrolling duty along with API Adhikari also stated in his evidence that after the rickshaws were stopped, they smelt of Ganja and, therefore, panchas were called.

. P.W. 4 - Police Constable Sunil Pashilkar has stated that he carried the Muddemal sample packet to the Chemical Analyser in the covering letter and after it was delivered to the Chemical Analyser, he made an endorsement that he had received the sample.

. This is the only evidence which has been adduced by the prosecution. It is no doubt true that the prosecution has not examined the Chemical Analyser but has produced the report of the Chemical Analyser. Though it is strenuously urged by the learned Counsel appearing on behalf of the appellants that the non-examination of the Chemical Analyser was fatal to the prosecution case, in my view, the said submission cannot be accepted. It is no doubt true that it was

the duty of the prosecution to have examined the Chemical Analyser in order to establish that he had conducted number of tests before coming to the conclusion that what was found in the bags was Ganja and not any other substance. However, non-examination of the Chemical Analyser can be used as an additional factor in favour of the accused, if it is found that there is no additional corroboration through independent witnesses to prove the seizure of the contraband from the possession of the appellant/accused.

9. In the present case, P.W. 5 - API Uttamkumar Adhikari has, in his cross-examination, admitted that he suspected of NDPS substance being recovered, from the smell of Ganja Leaves which was coming from the bags. This fact is reiterated by P.W. 3 - Police Constable Pandurang Kumbhare who had accompanied the raiding party and he has stated in his evidence that after stopping the rickshaws, when they checked the rickshaws, they smelt Ganja and, therefore, panchas were called. From the statement of these two witnesses, it can be seen that before the bags were seized, the complainant P.W. 5 - API Uttamkumar Adhikari and P.W. 3 - Police Constable Pandurang had suspected that there was contraband

narcotic/psychotropic substance in the bags and from the smell both recognized that it was that of Ganja Leaves. Thus, though it was a chance recovery, yet, before the contraband was checked, having realized that it was smelling of Ganja, it was the duty of the P.W. 5 to have complied with the provisions of sections 42(1) and in any case provisions of section 50 of the N.D.P.S. Act and, admittedly, there has been non-compliance of both these provisions on the ground that it was a chance recovery and that the bags were not in the immediate possession of the accused. The Trial Court, on these grounds, has held that the provisions of sections 42 and 50 are not attracted in the present case.

10. It is not possible to accept the view taken by the Trial Court. The Full Bench of this Court in the case of Ebanezer Adebaya @ Monday Obtor Vs. State of Maharashtra reported in **1996(2) ALL MR 402**, while considering the question regarding meaning which could be assigned to the phrase "to search any person" used in section 50 of the N.D.P.S. Act, held that the said phrase would include search of articles in immediate possession such as bag and other luggage carried by him or in physical possession of the person to be searched. The Full Bench, therefore, held that the

personal search would be confined to clauses (a) and (b) of paragraph 5 and would not be extended to clauses (c) and (d) of paragraph 5. Paragraph 5 of the said judgment reads as under:-

> 5.....
> .....
> ...Whether "to search any person" means:
>
> (a) search of articles on the person or body of the person:
>
> (b) would include search of articles in immediate possession such as bag and other luggage carried by him or in physical possession of the person to be searched:
>
> or
>
> (c) would include search of bag or luggage which are presumed to be in possession of the person even though it may be lying in a house, or railway compartment or at the airport:
>
> and
>
> (d) whether application of Section 50 can be extended to a case of search of a place, a conveyance or a house if the accused is physically present at the time of the search."
>
> .....
> ....."

Therefore, the Full Bench held that if the baggage of the person is to be searched, it would be included in the phrase "to search any person". In the present case, admittedly, bags and suit-cases which the accused were carrying belonged to them and they had kept them in the rickshaws. It was the duty of the

Investigating Officer, therefore, to inform the accused of their right to be searched before the Special Executive Magistrate or the Gazetted Officer. There is thus clear violation of the provisions of section 50 of the said Act and on that ground the accused are entitled to be acquitted and the judgment and order passed by the Special Court will have to be set aside on this ground alone. Apart from that, though the case of the prosecution, as can be seen from the evidence which is given by the prosecution witnesses, is that the appellants were travelling in two rickshaws and in each rickshaw there was one lady and two males and Ganja Leaves were being carried in their bags and suit-cases. The total weight of both these suit-cases which were found in two auto-rikshaws was 59 kgs and 900 grams. However, while framing the charge, the Special Judge has not referred to the two auto-rikshaws but has merely stated that on 24/7/2001 at about 3.15 a.m. near Sonal wines, M.G. Road, Naupada, Thane, the accused were found in conscious possession of Ganja 59 k.g. 900 grams which was in bag, suit case, in contravention of provisions of section 8(c) of Narcotic Drugs & Psychotropic Substances Act and, therefore, the offence under sections 20 and 29 of the N.D.P.S. Act was committed by the accused. There is, thus, obviously, no

reference to two auto-rikshaws and the charge is silent on that aspect. In the case of Mohammad Ismail s/o Karim Patel Ansari Vs. State of Maharashtra reported in **2003 ALL MR (Cri) 273** the learned Single Judge of this Court has held that if no specific reference is made to recovery of part of brown sugar from personal search then serious prejudice is caused to the accused. In the present case also, in my view, in view of no reference being made to the bags and suit-cases being carried in two separate rickshaws and that different accused were sitting in different rickshaws, serious prejudice is caused to the accused. A distinction could have been made by the accused regarding the quantity which was carried by each accused and thereby argument could have been advanced that the quantity which was found in their possession was either a small quantity or not a small quantity and, therefore, they could have claimed lesser sentence if the other factors had been proved. In the absence of specific charge being framed, therefore, a serious prejudice has been caused to the accused. The accused are already in jail since 24/07/2001.

11. Therefore, considering all these facts and circumstances, in my view, the prosecution has not proved its case beyond the reasonable doubt and the

accused are entitled to the benefit of doubt.

12. In the result Judgment and Order passed by the Special Judge is accordingly quashed and set aside. The appeal is allowed. The appellants - accused are acquitted of the offences with which they were charged. They are directed to be released forthwith unless otherwise required in any other case.

(V.M. KANADE, J.)